

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

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U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte MICHAEL P. RYAN, NORMAN J. GLOMSKI and HENRY M. HUND

Appeal No. 2005-1412
Application No. 10/049,697

ON BRIEF

Before MCQUADE, NASE and BAHR, Administrative Patent Judges.
BAHR, Administrative Patent Judge.

DECISION ON REQUEST FOR REHEARING

This is a decision on the appellants' request for rehearing, filed October 11, 2005, under 37 CFR § 41.52(a)(1) of our decision mailed August 11, 2005 affirming the rejections of claims 9-26 under 35 U.S.C. § 103. The basis of the appellants' request is that this panel, in our earlier decision, misinterpreted the term "similar" in claims 9, 15 and 21. The appellants, wishing to have the claim term "similar" interpreted as "identical," have also submitted as an appendix to the request an amendment, for consideration by the examiner, changing the term "similar" in claims 9, 15 and 21 to "identical."

As support for their contention that the claim term "similar" should be read to mean "identical," the appellants point to the text in their specification at page 13, lines 14-22 and page 14, lines 24-26, which read as follows.

The cross-sectional perimeter, shape or profile of the hopper module 92 and the end of the body module 76 that mates with the hopper module 92 are identical where they overlie each other. The cross-sectional perimeter of the tailgate module 82, the body module ends 74, 76 and the hopper module 92 where they mate with or overlie each other are identical throughout the line of RCVs (front loader, side loader, rear loader and modifications and combinations thereof). In particular, the bulkhead 93 of the side loader hopper module 93B will mate with the body module end 76 along the perimeter thereof.

....

The cross-sectional perimeter, shape or profile at the areas of the hopper module, body module and tailgate module are all identical where they mate with or overlie each other.

Conspicuously absent from the cited text is the term "similar." The appellants have described the ends of the various modules as being "identical" in the underlying disclosure but have selected a distinctly different term, namely, "similar," in the claims to describe the ends of the body modules.¹ The specification sets forth neither an express nor an implied definition of the term "similar" and provides no indication that the

¹ Our reviewing court has repeatedly warned against confining the claims to the very specific embodiments often described in the specification. Phillips v. AWH Corp., 415 F.3d 1303, 1323, 75 USPQ2d 1321, 1334 (Fed. Cir. 2005).

term "similar" is being used in a manner different from its ordinary and customary meaning, which does not call for exact likeness and in fact permits differences. Moreover, we find no indication in the record that the examiner treated the term "similar" in the appellants' claims as meaning "identical," as contended by the appellants on page 1 of the request.²

As pointed out in our earlier decision (page 7), review of Zanzig's Figures 1-2 and 21-22 indicates a striking resemblance between the front and rear ends of the body 50 in the side loader vehicle and the front loader vehicle, thereby providing full response to the "similar" limitation in the appellants' claims. Moreover, as pointed out by the examiner (answer, page 5), the body is identified using the same reference numeral 50 in Figures 1-2 and Figures 21-22. Inasmuch as Zanzig's written specification fails to indicate any difference between the body 50 in Figures 1-2 and the body 50 in Figures 21-22, the examiner's contention that this would indicate to one of ordinary skill in the art that the bodies are the same or at least that there are no substantial differences between them, especially in light of the provision in 37 CFR § 1.84(p)(4) that "the same reference character must never be used to designate different parts," is well founded. Thus, even if the term "similar" in the appellants' claims 9, 15 and 21 were read to mean "identical" as urged by the appellants, Zanzig would have suggested such to one of ordinary skill in the art.

² Accordingly, any contention that this panel's treatment of the term "similar" in our earlier decision so differed from the rationale of the examiner that our affirmance of the examiner's rejections under 35 U.S.C. § 103 constituted new grounds of rejection as provided in 37 CFR § 41.50(b) would not be well founded.

As for the amendment appended to the appellants' request, we note that amendments after the date of filing a brief are addressed in 37 CFR § 41.33(b) and (c). Inasmuch as none of the circumstances enumerated therein under which amendments after a brief may be admitted is present in this case, the amendment appended to the appellants' request will not be admitted.

For the reasons discussed above, the argument in appellants' request has not persuaded us that our earlier decision should be modified. Accordingly, the appellants' request for rehearing is granted to the extent that we have reconsidered our earlier decision but denied with respect to making any modification thereto. The rejections of claims 9-26 under 35 U.S.C. § 103 remain affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

DENIED


JOHN P. MCQUADE
Administrative Patent Judge


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